

PUBLIC DEFENDER NEWS

CHIEF'S CORNER

OPD has been in existence for nearly a decade. We are still a young agency when compared to the other established state agencies, but many of our folks were not around at the beginning. A review of OPD's early days will help us to better understand the modern-day agency and the funding challenges we continue to face.

In the early 2000's, Montana had no state-wide public defense agency at the trial court level. The state did provide counsel for indigent persons for appeals and postconviction proceedings, through the Appellate Defender Office. However, each county and municipality was individually responsible for providing the constitutionally-mandated right to counsel to those who cannot afford to hire an attorney in courts of limited jurisdiction and district courts.

The Montana ACLU filed a lawsuit challenging this *ad hoc* system. The Office of the State Public Defender (OPD) was created as a result of settlement of this lawsuit. In a Stipulation filed in May, 2004 the Attorney General agreed to advocate with the Legislature to create a state-wide public defender agency, which would include creation of regional offices, hiring of full-time attorneys and staff, reliance on contract attorneys, and imposition of caseload limits according to the *ABA Ten Principles of a Public Defense Delivery System*.

Senate Bill 146 was introduced in the 2005 legislative session. Public defense costs in courts of limited jurisdiction initially were estimated by the National Legal Aid and Defender Association at \$8,000,000. However, the fiscal note provided that only \$1,777,546 would be transferred to the state from the cities and counties. This amount was based on a county survey which estimated the justice court costs to be assumed by the state to be \$1,040,000 in FY 2007, and city and municipal court costs to be transferred were estimated to be \$737,546 in FY 2007. The initial 2004 estimate for taking over representation in DN cases was

\$515,018. Representation of indigent parents later was added to the bill. At the time, there was no uniformity in terms of the stage at which courts appointed counsel. According to the fiscal note, some courts appointed counsel



CONTINUED ON PG 2

INSIDE THIS ISSUE

Appellate News.....	3
Legislative Update.....	4
Tips and Tricks.....	6

SPECIAL POINTS OF INTEREST

- Welcome!
- Kudos, Awards, and More Awards!

for parents immediately upon the filing of a court petition, while others waited and appointed counsel at later stages in the case. Based on costs incurred in these various courts during a 6-month period in FY 2004, the fiscal note estimated an additional cost of \$209,508 per year to represent indigent parents in all DN cases. The total DN estimate was \$724,527. The initial total budget (all from the general fund) was \$13,786,495.

The inadequate initial funding compounded by caseload increases has stressed the agency from its inception.

During FY 2006 the Public Defender Commission and the Office of the State Public Defender were formed. OPD assumed operations of five county public defender offices, and 40 attorneys and 22.75 staff persons were transferred from county offices to the state. The agency began operations on July 1, 2006 (FY 2007), and employed 90.25 FTE. During FY 2007 the agency was approved to bring on 192.5 FTE or 102.25 more than the original 90.25 to support its strategic plan.

In FY 2007, OPD's first full year, we reported 25,549 new cases entering the system. These cases included 14,730 cases in the courts of limited jurisdiction and 10,819 cases in the district courts. There was no accurate information on the number of cases worked by the counties and municipalities prior to the creation of OPD. However, assuming that the number of cases filed in all courts in FY 2007 did not increase significantly from prior years,

it is clear that the initial funding levels were insufficient. Two examples demonstrate this point.

In OPD's first full year, we spent \$5,441,511 for the lower court cases. There was no indication that the level of cases filed in FY 2007 spiked upward in an amount to warrant this increase. It is clear that the original estimate of \$1,777,546 for these cases was some \$3 million too low.

OPD expended \$2,178,015 in all DN cases in FY 2007. Here, too, the original estimate of \$724,527 was substantially inaccurate.

From FY 2010 to FY 2014, OPD experienced a case increase of 4,045 for all types of cases. This represents a growth of 14.6%. DN cases and lower court cases combined made up 72.2% of all of OPD's cases in FY 2014. DN cases, which because of their nature require that OPD use contract attorneys in many cases to avoid conflicts of interest, increased during this period 34.1%. Lower court cases increased 11.9%.

The inadequate initial funding compounded by caseload increases has stressed the agency from its inception. In the current "no-government growth" climate it seems unlikely that our appropriation will solve the problem. However, we are optimistic that we will get the resources we need to continue our mission at the current level, and we appreciate all that each of you do to protect our clients' constitutional rights.

Bill



WELCOME!

Joe Zavatsky, Region 11 RDPD

We would like to welcome Joshua Mirel as the assistant public defender in the Miles City office. Josh joins our office after many years of working in public defense, most recently as an OPD contract attorney in Missoula. We are having fun hitting the ground running with Josh and look forward to him bringing his extensive experience to Eastern Montana.

APPELLATE NEWS

The Constitution v. the Rape Shield Act: Tension in Child Sex Prosecutions



Wade Zolynski,
Chief Appellate Defender

There's tension in the air. And, I'm not talking about the legislative session. I'm talking about the tension between a criminal defendant's constitutional right to defend and Montana's Rape Shield Act. The tension is particularly thick in child sex cases when evidence exists that

someone other than the defendant has sexually abused the alleged child victim. Now, add this to the tension: the prosecution theorizes that the child's sexual knowledge or sexualized behavior is evidence of the defendant's guilt.

Shouldn't the defendant be permitted to enter evidence that the child's sexual knowledge and sexualized behavior resulted from another's sexual abuse? If not, won't the jury make the only reasonable conclusion – that the defendant must have sexually abused the child? Indeed, how else would a young child be so knowledgeable about sex?

Within days of starting law school classes, I learned that conflict between a legislative act and a constitutional provision should result in the constitution prevailing. Montana's rape shield statute indicates that "evidence concerning the sexual conduct of the victim is inadmissible" in court. Mont. Code Ann. § 45-5-511. That is a pretty broad statement.

The constitution, on the other hand, has been interpreted this way: "Whether rooted in the Due Process Clause of the Fourteenth Amendment or the Compulsory Process Clause of the Sixth Amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *LaJoie v. Thompson*, 217 F.3d 663, 671 (9th

Cir. 2000) (citing, *Crane v. Kentucky*, 476 U.S. 683 (1986). Further, criminal defendants have a right to put before the jury evidence that might influence the determination of guilty. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Finally, "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Taylor v. Illinois*, 484 U.S. 400, 411 (1988).

Seems like tension to me. The Ninth Circuit resolved this tension in *LaJoie*. There, a trial court in Oregon prohibited LaJoie from informing the jury that others had raped or sexually abused the child. The jury convicted LaJoie. On appeal from a post-conviction relief petition, the Ninth Circuit reversed saying, "LaJoie's defense was seriously undermined because the jury heard only that part of the story that implicated him and was not permitted to hear highly

probative evidence which the jury could have determined was exculpatory." *LaJoie*, 217 F.3d at 673.

Much like *LaJoie*, Courts all around the country have reversed convictions due to this tension. *State v. Carver*, 37 Wash. App. 122, 678 P.2d 842 (1984) (reversing and ordering a new trial noting the jury would logically infer the defendant was guilty as charged due to the child's familiarity with sexual matters); *State v. Warren*, 711 A.2d 851 (Me. 1998) (reversing and ordering a new trial because "the jury must be informed of the child's

past sexual behavior in order to rebut the natural inference of her sexual naiveté"); *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325 (1990) (holding that applying the rape shield law to preclude a defendant from cross-examining a child victim about prior sexual abuse by other adults required reversal); *People v. Morse*, 231 Mich. App. 424, 586 N.W.2d 555 (1998) (holding the rape shield statute cannot preclude evidence that another man had engaged in sexual conduct with the young complainants); *State v. Payton*, 142 N.M. 385, 165 P.3d 1161 (2007) (holding evidence that an eight year old victim had

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CONTINUED ON PG 4

LEGISLATIVE UPDATE

The 2015 Legislature convened on January 5, and we are more than half-way through the session. Four of OPD's eight bills have been signed into law:

- ◆ HB 139, to allow regional deputies to participate in the eligibility process;
- ◆ HB 143, to suspend payment of public defender fees during periods of incarceration;
- ◆ SB 59, to clarify the court's consideration of the eligibility process; and,
- ◆ HB 133, authorizing the use of flat fee contracts in specialty courts.



SB 90, to eliminate jail time as a penalty for certain misdemeanors, and thereby removing the obligation for the court to assign counsel,

and a companion bill, SB 61, to clarify the court's punitive authority for nonpayment of fines imposed instead of jail time, both died in the House Judiciary Committee.

We continue to monitor the status of proposed legislation that might impact OPD or our clients. HB 218, which would have required licensing for OPD investigators, missed the transmittal deadline. HB 195, sponsored by Representative Nate McConnell, has been signed by the Governor. It will benefit our clients by revising pretrial diversion laws to allow deferred prosecution upon notice by the prosecutor.

There are several other bills that we are still following in addition to HB 2 and HB 3 (the general and supplemental appropriations bills), and HB 13 (the state employee pay plan).

Our budget hearings before the Section D subcommittee were in late January. Several support staff members appeared on their own time and gave compelling testimony regarding their status as working poor. The House Appropriations committee took executive action in early March. There are still many steps remaining before a final budget is adopted in the last days of the session, and we are optimistic that in the end we will have adequate funding.

If you are interested in following the process, go to the 64th Session [homepage](#).

APPELLATE NEWS CONTINUED FROM PG 3

previously been sexually abused by another was relevant to show that the victim had an alternate source of sexual knowledge); *State v. Rolon*, 257 Conn. 156, 777 A.2d 604 (2001) (holding that exclusion of evidence of alleged prior sexual abuse of a victim by a third party violated defendant's rights to confrontation, to present a defense, and to a fair trial).

Some Montana Supreme Court cases have danced pretty heavily around the issue with none producing positive results for defendants. *See State v. Stuit*, 286 Mont. 176, 885 P.2d 1290 (1994); *See also State v. Van Pelt*, 247 Mont. 99, 805 P.2d 552 (1991); *See also State v. Kao*, 245 Mont. 263, 800 P.2d 714 (1990); *See also State v. Rhyne*, 253 Mont. 513, 833 P.2d 1112 (1992).

Recently, the Court affirmed a conviction despite this tension. *State v. Martineau*, 2015 MT 46N. It was, however, a non-cite opinion and the issue was not cleanly preserved. Another case, *State v. Colburn* (DA 14-0181), is in the midst of briefing. Hopefully positive results will be had.

The tension is real. Both trial OPD and appellate OPD should continue advocating for the constitution.

AND THE AWARD GOES TO . . .



Congratulations to Terra Owen, Kalispell, for being named the January Support Staff Employee of the Month. Terra was nominated by the entire Kalispell office. She is being recognized for her “willingness to help every

single person in the office . . . a cheerfulness that pervades the whole office . . . Her commitment to the community and community service projects . . . [and because] she is always looking out for others.”

The February award went to Nancy Paul, Missoula. Nancy supports five attorneys in Missoula Municipal Court with “a morale-boosting attitude, empathy for our clients and a great work ethic.” “She is constantly looking for ways to streamline office procedures and make a smooth running office click even better. Nancy is the unofficial office get-together person . . . It is difficult to imagine this office without Nancy.”

The March recipient was Katie Hinkle, Billings. Katie received several nominations over the past couple months. She “juggles so many responsibilities throughout the day with a great attitude . . . and is a great resource for clients when their attorney is not available.” “Katie goes above and beyond to help EVERYONE in the office, not just the attorneys she’s assigned to.” “Katie Hinkle is fantastic. She keeps the municipal court organized . . . is courteous with clients . . . and does it all with a sense of humor. Above and beyond, every day.”

OPD is lucky to have Terra, Nancy and Katie, and many other awesome support staff employees. Thank you all for your contributions to OPD and to our clients.

Please continue to recognize your support staff and [submit](#) your April nominations by April 20.

KUDOS!

Bill Hooks

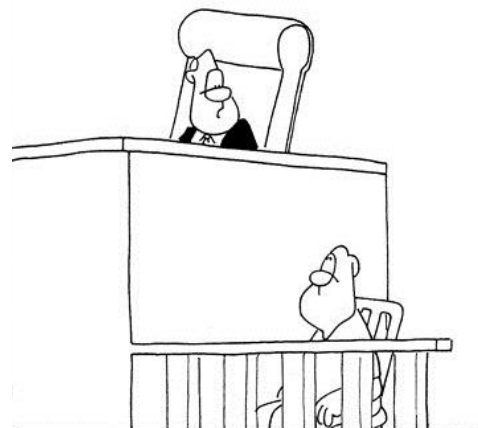


OPD staff, investigators and attorneys continue to earn hard-fought victories for our clients. In perhaps the most significant victory, in Region 8 a

district judge granted Regional Deputy Annie DeWolf’s pre-trial motion to dismiss a felony charge of sexual abuse. The case arose as a result of a “sting” operation, in which a police detective posed as a teen-aged girl. Annie asserted that her client had constitutionally-protected rights to privacy in his Facebook account, which rights the government violated when it intruded onto the Facebook account without first obtaining a warrant. Also in Region 8, Sheryl Wambsgans won victories in a PFMA misdemeanor trial and a DUI/drugs trial, and Nick Miller also won a DUI trial. Brigitte Carneal and Annie DeWolf prevailed on dispositive pretrial motions.

In Region 6, Regional Deputy Kaydee Snipes-Ruiz won a not-guilty verdict on a 2nd offense DUI charge.

In Region 4, Suzanne Seburn won an acquittal on a DUI charge in January, and Suzanne and Brady Smith gained another victory in a jury trial in March. Jon King and his able assistant Chris Abbott successfully challenged the state’s evidence regarding the fair market value of property in a theft case, and the jury returned a verdict on a lesser charge of misdemeanor theft.



“You again, Feldspar? Don’t you ever get away with **ANYTHING?**”

TIPS AND TRICKS

EXCEL TIPS

Brenda Ingersoll, Accountant

COMMON FORMULAS

=TODAY()

Current date

=NOW()

Current date and time

=CONCATENATE ("***-**-",RIGHT(B2,4))

Combines the last four digits of the SSN with the "***-**-
text string. What is between the quotes will be displayed
before the next part of the formula that will only take the
right 4 digits that are in the B2 cell.

=ROUND(Number, Num_digits)

Rounds a given number within the selected cell to a
specific number of decimal places.

=ROUNDDOWN(Number, Num_digits)

Rounds a given number down to the next lowest number
within the selected cell.

=ROUNDUP(Number, Num_digits)

Rounds a given number up to the next highest number
within the selected cell.

Operations in Formulas	
:	Colon
	Single space
,	Comma
-	Negation (as in -1)
%	Percent
^	Exponentiation
*	Multiplication
/	Division
+	Addition
-	Subtraction
&	Connects two strings of text
=	Comparison (Equal to)
<	Less Than
>	Greater Than
>=	Greater Than or Equal to
<=	Less Than or Equal to
<>	Not Equal to

APOSTROPHE'S ANYONE?

Absolutely not! Don't use
apostrophes to make words or
abbreviations plural (e.g., hats, CDs,
1970s). There are, however, a few
exceptions. You can use apostrophes
when they help eliminate confusion,
which happens most often with single
letters. Mind your p's and q's is the
typical spelling, and we write that the
word aardvark has 3 a's, not 3 as.

Whatever you do, don't follow these
examples!



More apostrophe outrage at
www.apostropheabuse.com/

and Grammar Girl tips at
[www.quickanddirtytips.com/](http://www.quickanddirtytips.com/grammar-girl)
grammar-girl